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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, Individually and as Postmaster General of the United States; GEORGE BROKAW, Individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, Individually and as Secretary of the Treasury of the United States,

Appellants,

vs.

LEIF HEILBERG,

Appellee.

APPELLEE'S RESPONSE TO MEMORANDUM
CONCERNING CHANGED CIRCUMSTANCES

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Appellee agrees that questions of mootness are avoided by the regulatory changes which require (1)

the destruction of existing and future indications of a desire to receive "communist political propaganda", and (2) a separate election for each piece of mail alleged to fall within the statutory category. Nor would we wish to criticize the *ex parte* change in the *status quo* of this case, since we are convinced that the attempt to reduce certain dangers of this on-going program¹ is beneficial to the appellee and all other persons affected by the statute.

However, we are of the opinion that the changes made by the Postmaster General do not remove below the threshold of constitutional notice the dangers he has attempted to meet, nor do they deal with the other significant, justiciable issues of this case, which are squarely presented and now ripe for this court's decision.

L THE STATUTE STILL SUBSTANTIALLY DELAYS THE DELIVERY OF MAIL.

The administration of 39 U.S.C. 4008 requires a substantial delay in the delivery of most, if not all, foreign mail from at least 28 countries (R.163-164). The court below found that the delay in the delivery of appellee's mail was sufficient to give him standing to raise the constitutional issues.² In view of the de-

¹On motion of the government, the injunction against the operation of the screening program was stayed by the court below pending final disposition of this appeal.

²The court's opinion stated (R. 217) : "Plaintiff's mail is still subject to delay since mail originating from designated countries must continue to be classified . . ." However, the court did not reach the question of whether the delay alone would make the program unconstitutional (R. 219).

cision in *A Quantity of Books v. Kansas*, 378 U.S. 205, and this Term's ruling on the Maryland motion picture censorship law, the crucial nature of delay need not be stressed.

The evidence in this case proves what the district court in *Lamont v. Postmaster General*, No. 491, this Term, failed to notice. This is, that the procedure followed in determining the desire of addressees to receive what has been classified as "communist political propaganda" necessarily results in a continuing delay in delivery of foreign mail. The delay will increase under the new procedures. Mr. Tyler Abell, Associate General Counsel of the Post Office Department, testified before a Subcommittee of the House of Representatives on the operation of 39 U.S.C. 4008 on June 19 and 20, 1963 (R. 41-42). He outlined its operation as follows: Once the Customs Bureau (of the Treasury Department) has decided what countries' mail should be screened, *all* mail from the designated countries is routed to one of eleven specially established screening points. Only at a screening point is the mail sorted and "exempt"³ mail, and sealed first class letters not subject to the terms of the statute, returned to the post office for delivery. Then each remaining piece of mail is examined. Then [quoting the answer to interrogatory No. 9 to defendant George K. Brokaw, Collector of Customs in San Francisco (R. 176)], "If from the addressee and the addressor, the

³"Exempt" means mail addressed to federal government agencies, public libraries, scientific or professional institutes, or an official thereof, and material forwarded pursuant to a reciprocal cultural international agreement. 39 U.S.C. 4008(e).

nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination as to whether or not it is propaganda material is made by the Assistant Deputy Commissioner [of Customs] *in New York.*" (Emphasis supplied.) Non-propaganda is then returned to the post office for delivery. Under the old procedure, if the addressee had a card on file expressing his desire to receive "communist political propaganda", the mail was delivered. If no card is on file,—and as to all "propaganda" under the new procedure—a notice is sent to the addressee that he must indicate that he desires to receive the mail, or it will be destroyed in 20 days. Thus, the statute results in some delay for all foreign mail, greater delay for foreign mail which is neither sealed, "exempt" or "propaganda", still more delay for mail which is "propaganda", and the destruction of mail which is unclaimed "propaganda."

What would seem to have been an attempt by Congress to minimize delay for material received by subscription, has been totally frustrated by an administrative interpretation set out as "Appendix A" to this Response. Congress said that detention "shall not be required in the case of any matter which is furnished pursuant to subscription . . ." [39 U.S.C. 4008 (a)]. But the post office requires proof from the addressee that he is a subscriber. See Appendix A. Under the new policy, since "the Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda" (Memorandum Concerning Changed

Circumstances, p.8), those subscribing to daily publications will have to return a card every day.

II. SECTION 4008 STILL DETERS THE EXERCISE OF FREE SPEECH AND PRESS.

The Memorandum of the Solicitor General commendably recognizes that the retention of a file of names of persons interested in "communist political propaganda" might deter the exercise of First Amendment rights. Indeed, the Solicitor concedes that even under the new policy the "alleged inhibiting effect on First Amendment rights" is only "far less severe" than it was under the former procedure. Appellee suggests that in measuring the effect of only the Post Office Department's change in policy on the operation of the Section 4008 program, the Solicitor has overlooked the evidence established in this case that the program is *jointly* operated by the Post Office Department and the Bureau of Customs.

Throughout the record in this case, there is a studied absence of any indication that the Bureau of Customs will treat the information its agents necessarily learn in the administration of Section 4008 with confidence. When the Associate General Counsel of the Post Office Department filed an affidavit with the court below concerning the confidentiality of the Post Office Department's card file formerly kept under Section 4008 (R. 156-157), the Bureau of Customs filed nothing. The Solicitor General's Memorandum indicates that the Postmaster General has taken further steps to protect the confidentiality of the mails,

but this only highlights the silence of the Secretary of the Treasury, also an appellant herein, and his failure to take comparable steps; though his agents have equal access to the information necessary to administer Section 4008.⁴

In short, in this joint operation where both Customs and Post Office personnel must work closely together, where Customs personnel must examine and classify every piece of mail which is not "exempt" or sealed, the Post Office Department has made efforts to preserve the confidentiality of the recipients of "propaganda," but the Bureau of Customs has made no effort whatsoever. Yet it is the Customs officials who have misused similar information and provided the occasion for the fears expressed by addresses of material falling within the purview of Section 4008.⁵

⁴The transcript (R. 112) shows the following testimony by appellant Fixa, the Postmaster of San Francisco: "Q. Is the card, 2153-X, filed in the same place, in the same cabinet or box, with the cards of other persons who have similarly expressed a desire to receive communist political propaganda? A. Yes, sir, they are all filed in alphabetical order. Q. Where is that file kept? A. It's in the Foreign Propaganda Unit. Q. And are there post office employees who have access to that list? A. Both post office and custom employees. It's a joint operation." (Emphasis added.)

⁵Mr. Irving Fishman, Deputy Collector of Customs for New York, testified as follows before a House Committee concerning the predecessor to the Section 4008 screening program:

"Mr. Arens: You have given the Committee, in private session, lists in great volume of the recipients of this communist propaganda; have you not?"

"Mr. Fishman: That is right."

Hearings Before the House Committee On Un-American Activities, 85th Cong., 2d Sess. 2794 (1958).

More recently Mr. Fishman testified: "[W]e have been instrumental in furnishing a great number of the intelligence fraternity with information on what is coming into the country. We have been able to keep for example, the Department of Justice, the

III. OTHER CONSTITUTIONAL ISSUES MAY BE DECIDED WITHOUT REMAND.

It has been appellee's position from the outset of this case that the First Amendment removes all power from the Federal Government to undertake a mail screening program based upon alleged propaganda content. The founders of this country did not leave power in the government to engage in such an activity, regardless of whether individuals are directly harmed by it or not. The factual finding of delay in mail delivery gives appellee standing to raise this issue.

The mere labeling of mail as "communist political propaganda" has an unconstitutional deterrent effect. Some, perhaps many, of our citizens will take this governmental judgment of worthlessness as final and make no further investigation. Others will find it unpatriotic to peruse what the government has told them is bad for them. The harm to free communication of ideas is real and direct.

Each time a Customs official must open and read a piece of mail addressed to a resident of this country under the Section 4008 program, he violates that resident's right to freedom from unreasonable searches and seizures. It is true that foreign mail may be in-

Foreign Agents Registration Section, aware of the activity of the foreign agents so that they can compare what we have given them with what the foreign agents report themselves each year, and we have been helpful to a great many other intelligence agencies." *Hearings Before a Subcommittee of the House Committee on Appropriations, Treasury-Post Office Departments and Executive Office Appropriations for 1964*, 88th Cong., 1st Sess. 142 (1963). See also R. 120-121, 134, 137, 139.

spected, but this is for the legitimate purpose of preventing smuggling and enforcing revenue laws, not for the illegitimate purpose of inhibiting First Amendment rights.

IV. CONCLUSION.

Appellee does not believe any further actions in the court below could shed more light on the constitutional issues now fully presented by this case. We recognize the significance of these issues and the delicacy of the rare—perhaps unique—situation where an act of Congress has been held to abridge Freedom of Speech and Press. We think that there is neither room nor reason for delay in the resolution of these issues, nor has the action of the Postmaster General lessened their importance.

Dated, March 8, 1965.

Respectfully submitted,

MARSHALL W. KRAUSE,

COLEMAN BLEASE,

LAWRENCE SPEISER,

Attorneys for Appellee.

(Appendix A Follows)

Appendix A

**Post Office Department
Office of the General Counsel
Washington, D.C. 20260**

In reply refer to

WFL:fr

42-A-4

February 25, 1965

**Isidore G. Needleman, Esq.
165 Broadway
New York, New York 10038**

Dear Mr. Needleman:

We are quite mindful of the provision in 39 U.S.C. 4008(a) that the detention-notice procedure "shall not be required in the case of any matter which is furnished pursuant to subscription"

We are also mindful that many foreign mailers of communist political propaganda place the notation "Subscription Copy" on unsolicited matter in an attempt to circumvent the application of the cited law. In view thereof, we would be remiss in our duty to the Congressional mandate to accept such notation without first seeking the addressee's delivery instruction. We certainly have no way of knowing whether any addressee is a bona fide subscriber to any particular matter without first having contacted him.

For the General Counsel:

Sincerely yours,

**/s/ William F. Lawrence,
William F. Lawrance,
Associate General Counsel.**